UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRY'S ELECTRONICS, INC., Respondent v. ALEXANDER WARNER, an Individual, Charging Party	Case No. 32-CA-156938

RESPONSE TO GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT AND RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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RESPONSE TO GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT AND RESPONDENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Respondent Fry's Electronics, Inc (hereinafter "Respondent"), pursuant to Section 102.24 (b) of the Board's Rules and Regulations, hereby submits the following response to General Counsel's (hereinafter "GC") Motion for Summary Judgment (hereinafter "Motion") and Respondent's Cross-Motion for Summary Judgment in the instant matter. There are two aspects to this case. One part is a now common *D.R. Horton* case.[1] General Counsel alleges that Respondent's "Arbitration Agreement[2]," which new employees are required to sign, and which contains an agreement to arbitrate along with a class-action waiver, interferes with what General Counsel believes is Charging Party's Section 7 right to bring class-action wage and hour suits in court, and therefore violates Section 8 (a)(1) of the Act. The Complaint also alleges that the language of the Arbitration Agreement violates Section 8 (a)(1) by precluding or restricting employee access to the NLRB.

Respondent wishes to make its position clear. It agrees completely with General Counsel that summary judgment is appropriate in this case. Respondent agrees that there are no issues of material fact, that only legal issues remain, and that summary judgment is therefore appropriate. However, that is where the agreement ends, as Respondent believes that summary judgment should be granted in its favor. Regarding the *D.R. Horton* issue, Respondent believes that that case was wrongly decided and is contrary to applicable statutory and case law. Accordingly, it should be reconsidered by the Board and reversed. Regarding the "access to the Board" portion of the case, Respondent submits that the language of the Arbitration Agreement, on its face, is not reasonably susceptible to an interpretation that would limit the employees' rights to file a

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[1] *D.R. Horton, 357 NLRB* 2277 (2012), enf. denied in relevant part 737 F. 3d 344 (5th Cir. 2013).
[2] Attached as Exhibits A and B to the Second Amended Complaint.

charge with the Board. Moreover, even assuming *arguendo* that it is, such a provision, as part of an agreement to arbitrate, is privileged by the Federal Arbitration Act[3]. Accordingly, summary judgment should be granted in Respondent's favor as to all elements of this case.

II. ARGUMENT

A. D.R. Horton And Its Progeny Were Wrongly Decided And Should be Reversed.

1. D.R. Horton Is In Irreconcilable Conflict With The Federal Arbitration Act.

The Federal Arbitration Act ("FAA") represents this country's "national policy favoring arbitration." *American Express Co. v. Italian Colors Restaurant,* 133 S. Ct 2304, 2309 (2013). Thus, the FAA mandates that arbitration agreements must be enforced according to their terms, unless the FAA's mandates are overridden by express congressional requirements, set forth in another statute. *Id. 133 S. Ct. at 2309.* That congressional requirement cannot be supplied by implication or by the NLRB seeking to expand the reach of Section 7 through case law. Instead, the Congressional override can be established only by express language in the actual text of the statute. *See, CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 672-73 (2012).* Of course, Section 7 contains no such command. Indeed, the National Labor Relations Act, like hundreds or indeed thousands of other federal statutes, is totally agnostic with respect to arbitration. Simply put, there is no right under Section 7 to pursue a claim, unrelated to the National Labor Relations Act, in court, as opposed to through arbitration.

That the Arbitration Agreement in issue here also requires individual (as opposed to class-based) arbitration changes nothing as the United States Supreme Court has held in *AT&T Mobility v. Concepcion, 131 S. Ct.* 1740, 1748 (2011) that an agreement requiring individual arbitration is enforceable under the FAA. Simply stated, there is no Section 7 right to use the

[3] 9 U.S.C. Section 1 *et seq.*

procedure of a class action to assert a claim against one's employer. The entire area of class actions is governed by Rule 23 of the Federal Rules of Civil Procedure, which is a *procedural* rule. It grants no substantive rights whatsoever.

Thus, the *D.R. Horton* case and its progeny are directly contrary to the FAA, as interpreted by the Supreme Court and therefore cannot stand.[4] The Board must therefore follow the FAA, overrule *D.R. Horton* and its progeny and give full effect to the Arbitration Agreement in the instant case by granting summary judgment in favor of Respondent.[5]

2. D.R. Horton Is Also In Irreconcilable Conflict With The National Labor Relations Act.

D.R. Horton and its progeny must be overruled as they conflict with express provisions of the National Labor Relations Act. Specifically, Section 9(a) protects the right of the employee as an "individual" to "present" and "adjust" grievances "at any time." Moreover, the legislative history of the Act reinforces the unmistakable conclusion that notwithstanding protections for concerted or union activities, Congress intended to preserve for every individual the right to "adjust" employment-related disputes with his or her employer. *See Murphy Oil USA, Inc.,* 361 NLRB No. 72, slip op. at 22-35 (Member Miscimarra dissenting in part). This conclusion is reinforced by the language of Section 7, which expressly protects the rights of individuals to "refrain from" engaging in concerted activity. The Board's rulings in the *D.R. Horton* line of

[4] The Board's reasoning in *D.R. Horton* has been almost universally condemned by federal or state courts. For a listing of such cases decided through October of 2014, *See, Murphy Oil USA, Inc.* 361 NLRB No. 72 (2014), dissenting opinion of Member Johnson, at *slip op. p.36,* fn. 6.

[5] General Counsel argues in paragraph 7 of its Motion that: " [e]mployees can reasonably expect that they may be disciplined, as well as face legal action if they breach the Arbitration Agreement." This argument is completely baseless as there is nothing in the language of the Arbitration Agreement which would cause an employee to feel that they would be disciplined for bringing a legal action in court. In fact, the only place where discipline is even mentioned in the agreement is a statement that employees will *not* face discipline. " This Agreement does not prohibit Associate from engaging in concerted activity with other employees as protected by law, and Associate will not be subject to discipline or retaliation for engaging in such activity."

cases strip the individual employee of his or her right to agree to act individually to resolve disputes with the employer contrary to the provisions of Sections 7 and 9(a) referenced above.

B. The Language Of The Arbitration Agreement Precludes The Finding Of A Violation Of Section 8(a)(1).

The language of the Arbitration Agreement was carefully drafted to avoid any violation of the Act. Specifically, it contains the following savings clause. "This Agreement does not prohibit [the employee] from engaging in concerted activity with other employees as protected by law, and [the employee] will not be subject to discipline or retaliation for engaging in such activity." Since the Arbitration Agreement in issue contains express language guaranteeing to the employees the right to engage in protected, concerted activity, there can be no violation of section 8 (a)(1).

C. The Language Of The Arbitration Agreement Cannot Reasonably Be Interpreted As Prohibiting Access To The Board And Its Processes.

The second prong of General Counsel's case upon which it seeks summary judgment, is the allegation that the language of the Arbitration Agreement on its face unlawfully interferes with employees' access to the NLRB and its processes. In determining whether an employer work rule unlawfully interferes with Section 7 rights and thus violates Section 8(a)(1), "[t]he violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to the union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004).[6] In the instant case, there is no allegation that the provision of the Arbitration Agreement in issue was promulgated in response to employees wishing to file charges with the Labor Board, nor is there any allegation that it was

[6] The *Lutheran Heritage* case addressed the issue of whether employer rules violated Section 7 rights. However, there is no logical reason why the test would be any different in reviewing whether a rule unlawfully restricted employee access to the Board.

ever applied to limit such activity. Thus, the existence of a violation depends upon whether Respondent's employees could reasonably construe the language as prohibiting access to the NLRB. In determining whether this standard is met, the Board must do more than speculate that such a reading is conceivable. *See, Martin Luther Memorial Home, Inc.*, 343 N.L.R.B. 646, 646 (2004) ("In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *See also, Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 25-26 (D.C. Cir. 2001) where that court rejected the Board's argument that the company's policy prohibiting the use of "abusive or threatening language to anyone on company premises" had the "unrealized potential to chill the exercise of protected activity."

Under this standard, any conclusion that employees would read the language of the Arbitration Agreement as limiting access to the Board is speculative and indeed irrational in light of the *express* carve out for the filing of complaints with governmental agencies which provides: "[t]his Agreement is not intended to prevent Associate from filing complaints and/or claims with government agencies, commissions, boards, and/or other bodies of the government." So, on its face, the Arbitration Agreement does not seek to prevent or limit access to any government agency, including the NLRB. This point is reinforced in the following provision: "This Agreement does not prohibit Associate from engaging in concerted activity with other employees as protected by law, and Associate will not be subject to discipline or retaliation for engaging in such activity." Thus, there is simply no room in this language for an interpretation that the Agreement serves to waive the right of the Employee to bring charges before the Board.

Hyundai America Shipping Agency, 357 NLRB 861, 863 (2011), enf'd. in relevant part 805 F.3d 309 (D.C. Cir. 2015) is instructive. There the Board addressed the issue of whether the employer's rule prohibiting "harmful gossip" unlawfully interfered with employee rights in violation of Section 8 (a)(1). After reviewing the dictionary definition of "gossip" as "rumor or report of an intimate nature" or "chatty talk" the Board majority concluded that employees would not reasonably construe the company's rule against "indulging in harmful gossip" as prohibiting Section 7 activity.[7]

Accordingly, in light of the express carve out for agency proceedings, there is simply no basis to conclude that the Arbitration Agreement in issue here could reasonably be construed as limiting access to the Board. Accordingly, absent any allegation that the language of the Arbitration Agreement was promulgated in response to charge filing activity in the past, or that it has ever been applied to prohibit the filing the charge before the NLRB, summary judgment should be granted in favor of Respondent as to this allegation as well.

D. Even If The Provisions Of The Arbitration Agreement Could Reasonably Be Interpreted By Employees As Requiring The Arbitration Of Unfair Labor Practice Charges, Such A Provision Is Protected By The FAA And Therefore Not Violative Of The Act.

As stated above, the clear language of the Arbitration Agreement precludes any reasonable interpretation that the language would be applied to prohibit the filing the charge before the NLRB. Nonetheless, even assuming for the sake of argument that the language could be so construed, there is still no violation here as the FAA protects the enforceability of arbitration agreements, even those that require arbitration of alleged violations of the NLRA. As argued in Section II, A above, the FAA requires that arbitration agreements be enforced

[7] Interestingly, the Board majority flatly rejected Member Pearce's dissenting arguments that the term "harmful gossip" was imprecise, ambiguous, subject to different interpretations and accordingly should be construed against the employer.

according to their terms absent *express* statutory language overruling the strong national policy favoring arbitration set forth in the FAA. Since there is nothing in the National Labor Relations Act which prohibits an agreement requiring arbitration of employer unfair labor practices, the policies set forth in the FAA prevail. Indeed the provisions which *are* in the Act reinforce this conclusion. Section 8(a)(4) makes it an unfair labor practice to "discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act." However, there is no allegation in the Complaint of any such unlawful discharge or discrimination has occurred here. Congress could have drafted Section 8(a)(4) in a broader fashion to also make it an unfair labor practice to prohibit employer conduct which merely *interfered* with access to the Board. However, it did not do so, instead, limiting its reach to instances of actual discrimination or discharge. Accordingly, even assuming *arguendo* that the language in the Arbitration Agreement could be construed as requiring arbitration of alleged violations of the Act, summary judgment in favor of Respondent is nonetheless appropriate.

Moreover, while the rights guaranteed under the National Labor Relations Act are certainly important, they are no more important than other federal statutes protecting employee rights where agreements to forego the normal statutory processes and resolve disputes through arbitration have been enforced. *See e.g. 14 Penn Plaza LLC v. Peyett,* 556 U.S. 247, 258 (2009) (contractual agreement to resolve alleged violation of the Age Discrimination in Employment Act[8] through arbitration is enforceable.) To put it plainly, there is simply no statutory basis for the proposition that Congress intended to place the NLRA on a pedestal above all other federal statutes designed to protect the rights of employees, consumers or others.

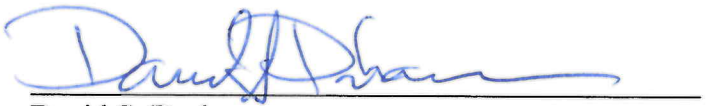
[8] 29 U.S.C. Section 621 *et seq.*

III. CONCLUSION

For each and all the foregoing reasons, Respondent respectfully requests that General Counsel's motion for summary judgment be denied, that Respondent's cross-motion for summary judgment be granted and the Complaint in this matter be dismissed in its entirety, with prejudice.

Dated: March 9, 2016

Respectfully Submitted,



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and Case: 23-CA-156938

ALEXANDER WARNER, an Individual

CERTIFICATE OF SERVICE

I certify that a copy of the Respondent's Response to General Counsel's Motion for Summary Judgment and Respondent's Cross-Motion for Summary Judgment in the above-captioned matter was electronically served on March 9, 2016 to the following parties:

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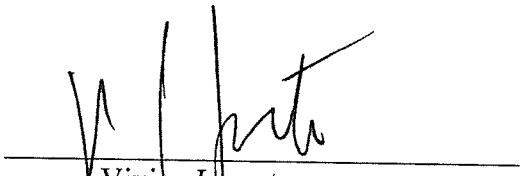

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